In the Supreme Court of the United States.

Postal Telegraph-Cable Company, Plaintiff in Error,

against

Borough of Taylor, Defendant in Error.

October Term, 1903.

No. 93.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This is a writ of error to a judgment of the Supreme Court of Pennsylvania. The action was commenced in the Court of Common Pleas of Lackawanna County, Pennsylvania, which entered judgment against the plaintiff in error for want of a sufficient affidavit of defense, and which judgment was in turn affirmed by the Superior Court of Pennsylvania and the Supreme Court of Pennsylvania.

The Borough of Taylor enacted an ordinance requiring all telegraph companies maintaining poles and wires within the borough limits to pay an annual license fee of one dollar ($1) for each pole, and two and one-half dollars ($2.50) for each mile of wire so erected or maintained.

This action was to recover such license charge or tax, for the two years beginning January 31, 1898, and ending January 31, 1900, upon the poles and wires of the plaintiff

in error. An affidavit of defense was duly filed, in which it was set forth by the plaintiff in error that it was a corporation of the State of New York, and had paid to the Commonwealth of Pennsylvania all taxes upon the values of its poles and wires maintained in the Borough of Taylor; that it had accepted the Act of Congress of July 24, 1866; that the poles and wires were used for the transmission of telegraphic messages of the United States government; that the highways upon which the poles and wires were constructed and operated are post roads and post routes; that said poles and wires constitute a part of the interstate telegraph system of the plaintiff in error, running into and through nearly every State of the United States and connecting with submarine cables from the United States to Europe and other foreign countries, and that messages transmitted over said line were in part telegraphic messages between different States of the United States and between the United States and foreign countries; and that the said ordinance imposed a tax upon interstate business, and was illegal and void. The further defense was made that the said license fees were not based upon the cost or expense to the said borough for inspection, supervision and regulation of the said telegraph line, and that said fees were more than twenty times the cost of inspection, supervision and regulation, together with all measures and precautions that might or could be required to be taken by said borough for the safety of its citizens and the public, and that said borough was not under any additional or incidental liability of any kind or nature in looking after the safety of said poles and wires and the maintenance thereof. The further defense was made that the assessment of such license fees or taxes was for the sole purpose of raising and producing revenue to said borough, and that the amount of said fees largely exceeded the entire cost to the plaintiff in error itself of maintaining said line, including all repairs, reconstruction,

cost of materials and traveling expenses of employees, and all expenses incurred by the plaintiff in error for the careful and efficient inspection and maintenance thereof; that the said license fees were prohibitive, in that the charge exacted was so excessive as to destroy the business of the plaintiff in error, inasmuch as the amount of said charges upon all of its poles and wires in the State of Pennsylvania would require it to pay a sum in that State alone exceeding one hundred thousand dollars ($100,000) per annum.

The Court of Common Pleas of Lackawanna County entered judgment against the plaintiff in error for the full amount of the claim of said borough, upon a rule taken for judgment for want of a sufficient affidavit of defense; and from the judgment thus entered this appeal has been taken to this Court.

SPECIFICATIONS OF ERROR.

(1) The learned Supreme Court erred, in affirming the judgment of the Superior Court of Pennsylvania;

(2) The learned Supreme Court erred, in not reversing the judgment of the Superior Court of Pennsylvania.

ARGUMENT.

Since the record in this case was removed to this Court, there have been two decisions rendered, which cover the points undertaken to be here presented. It is only necessary, therefore, that it shall now be determined, whether or not, under the facts set forth in the affidavit of defense, filed by the plaintiff in error, the case should have been left to the determination of a jury, and the reasonableness of the

license fees charged by the Borough of Taylor, determined in that forum.

In the case of Western Union Telegraph Company vs. Borough of New Hope, 187 U. S. 419, this Court held, that

> "a borough had the right, in the exercise of its police powers, to impose a reasonable license fee upon telegraph poles and wires within its limits, and that an ordinance imposing such fee is to be taken as *prima facie* reasonable;" and also said, "this license fee was not a tax on the property of the company or on its transmission of messages or on its receipts from such transmission or on its occupation or business, but was a charge in the enforcement of local governmental supervision, and as such not in itself obnoxious to the clause of the Constitution relied on."

The Borough of New Hope, the defendant in error in that case, is a borough in the State of Pennsylvania, and the Borough of Taylor, the defendant in error here, is a borough existing under the same laws, and consequently possessed of the same powers; and it is not necessary, therefore, to present any argument here as to its right to impose license fees of this character, provided the same are reasonable.

A jury trial was had in that case, and a verdict duly rendered after the submission of evidence upon the part of both parties interested. The decision did not, however, reach further than to hold that it was going much too far to ask this Court to hold the ordinance void, and in this connection said:

> "As the Supreme Court pointed out, the elements entering into the charge are various, and the Court of Common Pleas, the Superior Court and the Supreme Court of Pennsylvania have held it to be reasonable, and we cannot say that their conclusion is so manifestly wrong as to justify our interposition."

It is respectfully submitted, however, that the facts set forth in this case bring it within the ruling of the case of the Atlantic & Pacific Telegraph Company *vs.* City of Philadelphia, 190 U. S. 817, which was decided June 1, 1903, and followed the decision of the case of the Western Union Telegraph Company *vs.* Borough of New Hope, *supra*, which was decided January 5, 1903. In this last case, although trial was had before a jury, the Court nevertheless instructed the jury to render a verdict in favor of the plaintiff, the city of Philadelphia, for the full amount of its claim; and the decision of this Court went entirely to the point that, under all the facts, this was error, and that the case should have been left to the determination of the jury, for its decision, as to whether or not the license fees were reasonable. In the course of this last decision the Court said:

> "What is reasonable in one municipality may be oppressive and unreasonable in another. In determining this question the Court will have to regard all the circumstances of the particular city or corporation, the objects sought to be obtained, and the necessity which exists for the ordinance. Regulations proper for a large and prosperous city might be absurd or oppressive in a small and sparsely populated town or in the country."

It is distinctly set forth in the affidavit filed herein that the sole purpose of assessing this license tax was to raise and produce revenue to said borough; also, that the said telegraph company never has, and does not now, maintain any office whatsoever, in the Borough of Taylor, and that its telegraph line merely runs through the said borough, and no telegraphic business of any kind is transacted therein. It was further set forth that the said borough is a sparsely populated district, and the land therein of small value, and the land on the highways, on which the telegraph line was constructed, is not adapted for building purposes,

nor commercial use, and the highway is little traveled; that said borough is a coal mining community, and the buildings therein consist for the most part of coal miners' cabins or houses, of one or two stories, and the business buildings are scattered, and consist mostly of small shops or stores.

It has been repeatedly held in the State of Pennsylvania that all of the averments contained in an affidavit of defense must be treated as established facts.

Smyth *et al. vs.* Miller, 174 Pa. 679.

Further commenting upon the facts as they appeared in the case of Atlantic & Pacific Telegraph Co. *vs.* City of Philadelphia, *supra*, this Court said:

> "The reasonableness of this license charge being tried before a jury, the parties were entitled to a finding of the jury upon that question of fact, unless the testimony was such as to compel a decision one way or the other, in which case the Court might be justified in directing a verdict. After a careful review of the evidence, we are constrained to believe that it was not such as to exclude any other conclusion than that directed by the Court. We do not hold that it was not sufficient to sustain a finding by the jury to that effect, but simply that there were matters presented from which a jury might rightfully conclude that the ordinance and license charges were unreasonable."

This Court then pointed out the questions of fact which in its opinion required the case to be presented for the jury's determination, as follows:

> (1) "The removal of charges on underground wires was as an inducement to have the wires placed underground, and the only requirement was that whoever did it should supply the city or furnish the city with one duct or chamber for the use of the city. There was no other charge con-

nected with it; it was to remove all license charges to have them place their wires under ground."

(2) "There was evidence of the expenses of the electrical bureau . . . but there was no testimony definitely disclosing how much of the labor of that bureau was in respect to telegraph wires and poles, and how much in respect to electric light wires and poles. . . . On the other hand, the company showed the extent of its own supervision and the cost of repair, maintenance and supervision. . . . There was also proof of the number of electric light lamps, poles and miles of wire within the city, and other kindred facts."

This Court expressed its views as to the result of a consideration of these facts in the following language:

"Now, the comparison of all this evidence, the determination of its weight and effect, and whether the charge made by the city for supervision was reasonable or not, should have been left to the jury. As there was testimony that the actual cost of maintenance, repair and supervision was, during the years in question, less than one-half that charged by the city for supervision alone, and as it appeared that at first the license fee per mile of overhead wire was two dollars and one-half and underground wire one dollar, and that within three years thereafter all charges in respect to underground wire were taken away, and, as the head of the Electrical Department declared, was taken away for the purpose of inducing the removal of overhead wires and placing them all underground, the jury might have found that the ordinance was unreasonable. It might have come to the conclusion that the charge was not made simply to meet the expenses of supervision, but rather to make a charge so burdensome as to compel the company to remove its wires from poles and put

> them in conduits. . . . We think, therefore, the Court erred in withdrawing the case from the jury."

In the present case the facts set up to meet the test above set forth, in the opinion of this Court, and which, accepted as true, are sufficient to require it to be held that the ordinance in question is unreasonable in its provisions, are as follows:

(1) The telegraph company has accepted the Act of Congress of July 24, 1866, and is engaged in interstate commerce.

(2) The pole line in question was erected in the Borough of Taylor in the year 1886, long before the incorporation of the said borough; and no business is transacted therein by the telegraph company.

(3) The ordinance is designed and intended to provide revenue, by taxation, for the general expenses of the borough, and no other object than this exists, or has any time existed, for such regulations as are imposed by the terms thereof.

(4) The borough is under no expense whatever of issuing a license, and has not been at any time before, during or after the period mentioned for which it makes its charge under any expense, of any kind or nature, in inspecting and regulating the poles and wires of the telegraph company.

(5) The license fees imposed by the ordinance are more than twenty times the amount that might have been or could possibly be incident to an inspection, supervision and regulation thereof, together with all reasonable measures and precautions that might have been or possibly could be required to be taken by the borough for the safety of its citizens and the public, or which might have been or possibly could be incurred as expenses for the most careful, thorough and efficient inspection and supervision that might have been

made of the poles and wires, notwithstanding the fact that the borough has not and does not maintain any inspection, supervision or care whatsoever over the poles and wires, and has incurred no expense whatever on account thereof.

(6) The borough was not, at any time, under any additional or incidental liability of any kind or nature in looking after the safety of the poles and wires and the maintenance thereof, or for any injuries to persons or property that might have arisen or did arise during the period for which the charges are made.

(7) The borough is a sparsely populated district and the land therein of small value, not adapted for building purposes or commercial use, and the highway on which the poles are erected is but little traveled.

(8) The rental value of the land used by the telegraph company in the borough is not worth more than twenty-five (25) cents per annum for the ground occupied by each pole.

(9) The poles and wires thereon are located on the side of the highway, at a point between the roadway and what is or could be used as a sidewalk; and they do not interfere, in the slightest degree, with the use of the highway for all highway purposes, nor with the use of the sidewalk for all the usual purposes of a sidewalk, and do not interfere in any way with any kind of traffic or with the operations of men or apparatus in extinguishing fires.

(10) The telegraph line is comparatively new and sound, not decayed or worn out; and there is no danger of accident from the decay or breaking down of the poles and wires.

(11) The license fees imposed are not proportionate to the value of the property upon which the line is located, nor to the obstruction to the highways caused by said line, nor to the interference with travel or business caused by the said line within the borough.

(12) The amount of the license fees is arbitrarily fixed by the borough without regard to any expense, inconvenience or detriment to the borough, either incurred or possible to be incurred, on account of the maintenance of the telegraph lines.

(13) The amount of the license fees annually imposed largely exceeds the entire cost to the telegraph company itself of maintaining the line, including all repairs, reconstruction, cost of labor and material and traveling expenses of employees and all expenses incurred by the telegraph company for a careful and efficient inspection and maintenance thereof.

(14) The imposition of these license fees is an attempt to tax the property of the telegraph company situated in the borough; and inasmuch as it has paid all of its corporation taxes in the State of Pennsylvania, its property in the borough is not subject to direct taxation.

(15) The license fees are prohibitive, because they exact a charge so excessive as to destroy the business of the telegraph company; and similar fees exacted in all of the boroughs and municipalities of the State of Pennsylvania from the telegraph company would require it to pay annually a sum amounting to over one hundred thousand dollars ($100,000).

(16) On account of the impossibility to successfully compete with the only other large telegraph system in the United States, the effect of the imposition of these license fees would result in the insolvency of this telegraph company, inasmuch as the effect would be to cause its expenditures to be largely in excess of its receipts.

All of the above facts are duly set forth in the affidavit of defense filed in this case (record, pages 23 to 27, inclusive), and it is only necessary to state them in order to reach the conclusion that if they were proved as facts by

testimony presented to a jury the latter would be entirely justified in rendering a verdict which in effect would be that, the charges imposed being unreasonable, the ordinance of the borough is void.

The imposition of license fees or taxes of a character such as is attempted in this case is a burden which the telegraph companies are being compelled to bear and suffer to a greater extent within the last few years than ever before. If some arbitrary figure is to be presumed under all circumstances to be reasonable, without regard to the special facts which may exist in every particular locality, the protection of the telegraph companies, which have accepted the Post Roads Act of July 24, 1866, and are transacting business not only between the different States, but between the United States and foreign countries, absolutely requires that this Court shall halt the practice, or the entire community of the United States must suffer by reason of being required to pay larger tolls for telegraphic messages.

FRANK R. SHATTUCK,
For Plaintiff in Error.